



Office of Audits
Office of Inspector General
U.S. General Services Administration

Limited Scope Audit of Task Order NP4700101051 Funded by the American Recovery and Reinvestment Act of 2009

Report Number A110024/Q/A/P12007
May 2, 2012



Office of Audits
Office of Inspector General
U.S. General Services Administration

REPORT ABSTRACT

OBJECTIVES

The objective of our audit was to determine if the National Capital Region Client Support Center awarded and administered Task Order NP4700101051 in accordance with federal regulations.

**Acquisition Programs
Audit Office (JA-A)**
241 18th Street South,
Suite 607
Arlington, VA 22202
(703) 603-0189

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WHAT WE FOUND

We identified the following during our audit:

Finding 1 – The improper obligation of funds resulted in violations of the *bona fide* needs rule and the Antideficiency Act (ADA).

Finding 2 – Accepting funds near the end of the fiscal year resulted in an inadequate amount of time to solicit competition and award the task order.

Finding 3 – Relying on a poorly developed Independent Government Cost Estimate compromised the price reasonableness determination.

Finding 4 – Sharing information with the contractor put the Government at a disadvantage for receiving the best price.

Finding 5 – Lack of approval by legal counsel on high-dollar acquisitions affects the integrity of the award.

WHAT WE RECOMMEND

We recommend that the Regional Commissioner of the National Capital Region Federal Acquisition Service:

Determine whether you agree there is a reportable ADA violation.

- a. If you agree there is a reportable ADA violation, coordinate with Regional Counsel and the General Services Administration's Office of General Counsel to take appropriate action for reporting the ADA violation.
- b. If you disagree there is a reportable ADA violation, request an opinion from the Department of Justice's Office of Legal Counsel on whether the actions outlined in this report constituted an ADA violation.

MANAGEMENT COMMENTS

National Capital Region management disagreed with the majority of our findings. A summary of management's comments are included in the body of the report, followed by the Office of Inspector General's response. See **Appendix B** for management's full response.



**Office of Audits
Office of Inspector General
U.S. General Services Administration**

DATE: 5/2/2012

TO: Alfonso J. Finley
Regional Commissioner, Federal Acquisition Service
National Capital Region (WQ)

FROM: Lindsay S. Mough *Lindsay S. Mough*
Audit Manager
Acquisition Programs Audit Office (JA-A)

SUBJECT: Limited Scope Audit of Task Order NP4700101051 Funded by the
American Recovery and Reinvestment Act of 2009
A110024/Q/A/P12007

This report presents the results of our audit of Task Order NP4700101051 Funded by the American Recovery and Reinvestment Act of 2009. Our findings and recommendations are summarized in the Report Abstract. Instructions regarding the audit resolution process can be found in the email that transmitted this report.

Your written comments to the draft report are included in Appendix B of this report.

If you have any questions regarding this report, please contact me or any member of the audit team at the following:

Lindsay Mough Audit Manager lindsay.mough@gsaig.gov (703) 603-0269
Jacqueline Ogle Auditor-In-Charge jacqueline.ogle@gsaig.gov (703) 603-0220

On behalf of the audit team, I would like to thank you and your staff for your assistance during this audit.

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Introduction

The American Recovery and Reinvestment Act (Recovery Act) of 2009 was enacted to create new jobs, spur economic activity, and foster accountability and transparency in government spending. To help achieve these goals, the Recovery Act made \$275 billion available for federal contracts, grants, and loans.

With the enactment of the Recovery Act, the Federal Acquisition Service (FAS) experienced an increase in business volume as other federal agencies came to the Office of Assisted Acquisition Services Client Support Centers (CSC) for acquisition support.¹

In an effort to support the Recovery Act's commitment to accountability, the Office of Inspector General (OIG) for the General Services Administration (GSA) provides oversight of Recovery Act funds by monitoring task orders managed by the Office of Assisted Acquisition Services. As part of this oversight, we identified that the National Capital Region CSC awarded Task Order NP4700101051 at the end of fiscal year (FY) 2010 for \$6,679,433.60. The purpose of the task order was to obtain an Independent Verification and Validation of the products, services, and systems that will be installed for the information technology (IT) infrastructure task order during the consolidation of the Department of Homeland Security's (DHS) headquarters. The base year of the task order was funded by two-year Recovery Act funds in the amount of \$1,471,698.50 that expired at the end of FY 2010; as such we initiated a review to ensure that the funds were obligated properly.

The objective of our audit was to determine if the National Capital Region CSC awarded and administered Task Order NP4700101051 in accordance with federal regulations.

See ***Appendix A*** – Purpose, Scope, and Methodology for additional details.

¹ The Office of Assisted Acquisition Services provides federal agencies with assisted acquisition solutions through regional CSCs. The CSCs interface with agencies to define requirements and prepare and manage task and delivery orders.

Results

During our audit, we identified a number of issues that we believe warrant the attention of FAS in the National Capital Region.

Finding 1 – The improper obligation of funds resulted in violations of the *bona fide* needs rule and the Antideficiency Act.

The National Capital Region CSC modified the period of performance of a severable² services task order to exceed one year and extend past the period of availability of the funds. This modification violated the *bona fide* needs rule of fiscal law³ and, accordingly, the Antideficiency Act (ADA).⁴

The *bona fide* needs rule states that an annual appropriation may only be obligated to meet a legitimate, or *bona fide*, need arising during the period of availability of the appropriation and precludes contracts from crossing fiscal year lines. As an exception, 41 U.S.C. 3902(a) authorizes contracts for severable services to begin in one fiscal year and end in the next, as long as the contracts do not exceed one year. The *bona fide* needs rule also applies to multiple-year appropriations, which are subject to the same principles applicable to annual appropriations. Applying these principles, the period of performance of a severable services contract can exceed one year only if the period of performance is within the period of availability of the multiple-year appropriation.

The ADA prohibits government agencies from involving the Government in a contract or obligation before an appropriation is made. If it is determined that there is a violation of the ADA, the agency head shall report immediately to the President and Congress all relevant facts and a statement of actions taken.

The National Capital Region CSC awarded the severable services task order with a 12-month period of performance beginning on September 30, 2010, using two-year Recovery Act funds. The task order was subsequently modified to add two more months of performance, through November 29, 2011, and into FY 2012.⁵ This violated the *bona fide* needs rule as the period of performance exceeds one year and extends past the period of availability for the Recovery Act funds. Accordingly, the National Capital Region CSC violated the ADA by making an obligation after the availability of the Recovery Act funds and in advance of any FY 2012 appropriations.

Violating the *bona fide* needs rule and the ADA affects the integrity of acquisition support provided by the National Capital Region CSC. This could potentially diminish customer agency confidence and negatively affect the CSC's business. It is essential

² Severable services are continuing and recurring in nature, and value is received at the time the service is rendered.

³ Title 31 U.S.C. Section 1502(a)

⁴ Title 31 U.S.C. Section 1341 *et seq.*

⁵ We notified the National Capital Region CSC of the ADA violation and they subsequently modified the period of performance back to 12 months.

that the National Capital Region CSC review its internal processes to ensure that similar instances do not occur.

Management Comments

National Capital Region management believes that the funding authority for the task order in question was the Acquisition Services Fund, a no-year revolving fund. Therefore, they contend that neither the *bona fide* needs statute nor the ADA was violated. Management submits that even if the *bona fide* needs statute or 41 U.S.C. 390[2] had been violated, modifying the task order to reduce the period of performance to 12 months cured those violations, and an ADA violation did not occur. See **Appendix B** for management's full response.

OIG Response

We disagree with FAS's assertion that the funds were no-year funds because the Acquisition Services Fund was used to fund the task order.

The crux of FAS's response is that these obligations were made against the Acquisition Services Fund, a no-year revolving fund, so the *bona fide* needs test does not apply. However, money put in a revolving fund retains the same purpose and time limitations as the original appropriation. Specifically, except as provided by law, an amount authorized to be withdrawn and credited to a revolving fund is available for the same purpose and subject to the same limitations provided by the law appropriating that amount, regardless of whether the appropriated funds are transferred in before or after the services are performed. See Matter of: Implementation of the Library of Congress FEDLINK Revolving Fund, B-288142 (September 6, 2001).

Moreover, GSA and DHS clearly intended to apply the purpose and time limitations applicable to the DHS funds to the acquisition by GSA. Both DHS and GSA stated the *bona fide* needs test applied to the multiple-year Recovery Act appropriated funds used to fund these services in the Reimbursable Work Authorization and the Inter Agency Agreement.

Accordingly, the Recovery Act funds could not be obligated in FY 2012 and National Capital Region CSC's action in extending the period of performance into FY 2012 was improper.

To find an ADA violation, we have to conclude that there were no available funds for the FY 2012 obligation. FAS states it could have used the Acquisition Services Fund to pay the FY 2012 obligation and then sought reimbursement from DHS. We do not have any legal authority that clearly disputes this assertion. The statute that authorizes the Acquisition Services Fund, 40 U.S.C. § 321, states that if payment is not made in advance, then the Administrator "shall be reimbursed promptly out of amounts of the requisitioning agency in accordance with accounting procedures approved by the Comptroller General." This statute presumes that the requisitioning agency will have the

funds to reimburse FAS. However, DHS may, or may not, receive appropriations adequate to pay that obligation. Further, we do not believe that FAS's interpretation of 40 U.S.C. § 321 is consistent with the intent of the ADA. See e.g., letter from Secretary of Health and Human Services reporting ADA violations (July 14, 2011), <http://www.gao.gov/ada/GAO-ADA-11-23.pdf>. In that letter, one type of violation reported by the Secretary was "forward funding," which is similar to the situation here. The Secretary described the problem as follows.

As a general rule, severable services are the *bona fide* need of the fiscal year in which they are performed. For obligation purposes, except in accordance with express statutory authority, severable services are charged to the appropriation available at the time the services are performed. Thus, in a contract for severable services, base and option periods are funded out of the appropriation available at the time of contract award or option exercise. However, such funds are available for up to twelve months, in accordance with the statutory exception at 41 U.S.C. § 3902, which permits agencies to obligate funds current at the time of contract award to fund a severable services contract and cross fiscal years, provided the performance period does not exceed one year.

The contracts referenced on the attachment as "forward funded" all suffered from the same defects. That is, agencies obligated annual appropriations to cover performance in excess of twelve months and additionally in some instances, to use current year appropriations to fund contract performance that would not begin until a subsequent fiscal year. As noted, these types of "forward funding" are problematic, as annual funds obligated on a contract for severable services are only available for twelve months after obligation (*i.e.*, after contract award or option exercise). Thus, on these contracts, annual funds were used not only to fund the *bona fide* need for the year in which the obligation was made, but also to fund the *bona fide* need of future fiscal years. As a result, agencies obligated the government to acquire severable services for future fiscal years in which no appropriation had yet been made, and thus obligated funds *in advance* of appropriations which could be used for such services. In addition, agencies also obligated funds to acquire severable services in an amount that exceeded and could be charged to the annual appropriation in question.

We question whether FAS can, consistent with the ADA, use the Acquisition Services Fund to fund severable services contracts where it expects to be reimbursed but does not have assurance that the requisitioning agency will receive appropriated funds in the future to reimburse FAS. We believe that FAS may rely on reimbursement only when there is assurance that the requisitioning agency will have the money available. We do not believe that was the case here.

We also disagree with FAS's discussion of curing an ADA violation and do not believe an ADA violation could be cured in the fashion FAS describes. Two of the three cases cited by FAS support FAS's position that a "cured" violation need not be reported. However, neither case is applicable to the current situation. No accounts were adjusted here—instead, a period of performance was adjusted. This was not a violation of the "Purpose" provisions of appropriations law—this was a violation of the "Time" provisions. In the original task order, where there is no appropriation available to cover the FY 2012 services, there is no account to adjust. Therefore, this situation cannot be

cured and must be reported. See Department of the Army—Escrow Accounts and the Miscellaneous Receipts Statute, B-321387 (March 30, 2011) (the Army incurred violations in certain contracts in 2006, but in 2009 cured the violations by amending the indemnification clauses in those contracts. GAO held that even though the Army corrected the violations, it still had to file an ADA report); see *also* DOD Use of Operations and Maintenance Appropriations in Honduras, B-213137 (June 22, 1984) (the Army could not cure ADA funding violations with respect to obligations incurred in a previous fiscal year unless funds available from that previous fiscal year were available for adjustment).

We are unaware of a case specifically on point with the issue here, where FAS asserts that it could use funds from the Acquisition Services Fund (as opposed to the no-year revolving fund discussed in B-288142) and seek reimbursement (as opposed to advance payments discussed in B-288142) from DHS. Given our concerns with FAS's arguments that this was not an ADA violation, we recommend FAS request an opinion on whether this constituted an ADA violation from the Department of Justice's Office of Legal Counsel to resolve this issue.

Recommendation 1

We recommend that the Regional Commissioner of the National Capital Region Federal Acquisition Service:

Determine whether you agree there is a reportable ADA violation.

- a. If you agree there is a reportable ADA violation, coordinate with Regional Counsel and GSA's Office of General Counsel to take appropriate action for reporting the ADA violation.
- b. If you disagree there is a reportable ADA violation, request an opinion from the Department of Justice's Office of Legal Counsel on whether the actions outlined in this report constituted an ADA violation.

Finding 2 – Accepting funds near the end of the fiscal year resulted in an inadequate amount of time to solicit competition and award the task order.

The National Capital Region CSC did not have adequate time to solicit competition and award the task order because it accepted the Recovery Act funds near the end of the fiscal year. Acquisition Letter V-09-06 states that the decision to accept funds near the end of the fiscal year should take into consideration the minimum time required to contractually obligate the funds properly.

The Recovery Act funds used for this task order needed to be obligated by the end of FY 2010. Despite this requirement, the National Capital Region CSC accepted the funds on September 20, 2010. This allowed the National Capital Region CSC only nine business days for the entire award process. As a result of these strict timeframes, the solicitation period was limited to four business days. The short timeframes hindered competition, as no proposals were received by the end of the solicitation period. The

National Capital Region CSC extended the due date by one day, and subsequently received only one proposal. When accepting the funds, the National Capital Region CSC should have fully considered the minimum time interested contractors would need to prepare and submit proposals in response to the solicitation.

The short acquisition lead time restricted competition for this task order, which may have resulted in the Government paying more than it should have and not receiving the best value. In order to promote adequate competition, the National Capital Region CSC should only accept funds when it has a reasonable amount of time to solicit competition and award the task order.

Management Comments

National Capital Region management disagrees that there was an inadequate amount of time to solicit competition and award the task order. See **Appendix B** for management's full response.

OIG Response

In their response, management states that the task order's services were not considered complex, the scope was limited, and the dollar value of the procurement was not considered substantial. However, we disagree with this assertion as the task order was awarded to support the \$2.6 billion IT infrastructure task order for the Department of Homeland Security's headquarters consolidation. In addition, management states there were no requests for an extension of the closing date, which indicates that sufficient time was allowed for the submission of quotes. However, an extension was in fact provided because no proposals were received on the original due date. We maintain that more time was necessary for interested contractors to prepare and submit proposals in response to the solicitation.

Finding 3 – Relying on a poorly developed Independent Government Cost Estimate compromised the price reasonableness determination.

The contracting officer used an inadequate Independent Government Cost Estimate (IGCE) to evaluate pricing, thereby compromising the price reasonableness determination. The price analysis is particularly important given that there was no competition.⁶

An IGCE should reasonably represent the amount the Government expects to pay for the proposed effort. As such, the IGCE should be developed using the labor categories and hours the Government anticipates will be needed to accomplish the overall task order requirements.

⁶ Competition normally establishes price reasonableness and satisfies the requirement to perform a price analysis through a comparison of proposed prices.

However, in this case the National Capital Region CSC used the most senior level labor rates on Schedule 871 to “back into” the labor hours from the task order’s total budget to develop the IGCE. Given that a comparison of the proposal to the IGCE was the only price analysis technique used, the contracting officer’s price reasonableness determination cannot be relied upon.

Comparing the proposal price to a poorly developed IGCE affects the integrity of the task order’s price reasonableness determination. When relying on the IGCE to determine price reasonableness, the contracting officer should ensure it is developed based on the specific task order requirements.

Management Comments

National Capital Region management disagrees that the IGCE was poorly developed or compromised the price reasonableness determination. See **Appendix B** for management’s full response.

OIG Response

In their response, management quotes the draft price negotiation memorandum that states the IGCE was not used for comparison to the contractor’s quoted labor hours because it does not warrant a level of confidence in its accuracy. However, the final price negotiation memorandum states that the IGCE was in fact used to evaluate the proposal. Management also states that the ordering activity considered the level of effort and mix of labor/skill categories proposed and made a determination that the total price was reasonable for the effort. However, there is no indication that other price evaluation techniques outside the IGCE comparison were used to evaluate the labor mix and level of effort. Therefore, we maintain that use of the poorly developed IGCE compromised the price reasonableness determination.

Finding 4 – Sharing information with the contractor put the Government at a disadvantage for receiving the best price.

The contracting officer provided the contractor with the task order’s not-to-exceed (NTE) amount to signify the scope of the requirement. As a result, the contractor was given the opportunity to propose a price slightly below the NTE amount. Sharing this information should not be necessary as the statement of work should be specific enough to describe the scope of the task order.

The solicitation contained the task order’s NTE amount. Consequently, the contractor offered discounts off its schedule rates bringing the total proposed price to 0.77 percent below the NTE amount. The National Capital Region CSC stated that providing the NTE amount is a best practice⁷ used to depict the scope of work. However, by providing the

⁷ National Capital Regional counsel created a solicitation template to assist acquisition personnel in preparing solicitations. This template contained a space for the NTE amount.

NTE amount to potential contractors, the contracting officer cannot be assured that the Government is receiving the best price.

Contractor independence provides integrity to the acquisition process and can help ensure that the Government is receiving fair and reasonable pricing on the task order as a whole. The National Capital Region CSC should not provide contractors with the NTE amount as this practice could result in the Government paying a higher price.

Management Comments

Management agrees that the task order total NTE amount should not be included in the solicitation. See **Appendix B** for management's full response.

OIG Response

Although management agrees with this finding, they stated that the individual preparing the solicitation misunderstood the template instructions for solicitation preparation. However, the template includes a placeholder to be filled in by GSA for the total NTE amount for the base period and each option period (see *Figure 1*). We suggest the template be modified, as this could create confusion for any individual preparing the solicitation.

Figure 1 – Excerpt from National Capital Region CSC Solicitation Template

TOTAL NTE BASE PERIOD CLINS: \$ __[GSA FILL IN] _____

Finding 5 – Lack of approval by legal counsel on high-dollar acquisitions affects the integrity of the award.

The National Capital Region CSC awarded this \$6 million task order without a legal review. In accordance with a July 31, 2006, memorandum signed by the FAS Commissioner, a legal review is required for all task orders over \$5 million.

While the contracting officer and acquisition director reviewed the acquisition, a formal legal review did not occur. The National Capital Region CSC requested a legal review on the date of award; however, a note in the task order file stated that the National Capital Region legal counsel was unavailable on that date. By accepting the funds near the end of the fiscal year, the National Capital Region CSC could not provide adequate time for the proper review of the task order.

Approval from legal counsel provides integrity to the entire award process. When awarding high-dollar value task orders, the National Capital Region CSC should ensure adequate time is available for legal counsel to review the task order.

Management Comments

Management explained that failure to obtain a legal review is not a violation of law or regulation. Rather, failure to obtain legal review is merely a failure to comport with FAS internal policy. See **Appendix B** for management's response.

OIG Response

Although obtaining a legal review may not be required by law, it is required by FAS. Internal policy is still a requirement and obtaining a legal review is a sound business practice.

Conclusion

The National Capital Region CSC did not award and administer Task Order NP4700101051 in accordance with federal laws and regulations. Specifically, we identified a violation of both the *bona fide* needs rule and the ADA. These serious violations affect the integrity of acquisition support provided by the National Capital Region CSC. We also found that the National Capital Region CSC did not obtain a legal review prior to award of the \$6 million task order.

In addition, the National Capital Region CSC cannot ensure that the Government received the best price for this task order because it: (1) hindered competition by accepting funds late in the fiscal year; (2) relied solely on a flawed IGCE to evaluate pricing; and (3) shared the task order's NTE amount with the contractor. Given these deficiencies, the National Capital Region CSC did not demonstrate the ability to award and administer task orders properly. We are concerned with management's comments regarding the National Capital Region CSC's contracting practices and internal processes. As this audit was limited to the review of one task order, we are making no additional recommendations at this time. However, we will take this area under consideration during the Office of Inspector General's annual audit planning process.

Appendix A – Purpose, Scope, and Methodology

Report Number A110024/Q/A/P12007

Purpose

We initiated this limited scope audit as a result of the Office of Inspector General's monitoring of Recovery Act task orders managed by the Office of Assisted Acquisition Services.

Scope

The scope of this audit is limited to the award and administration of task order NP4700101051.

Methodology

To accomplish our objectives, we:

- Analyzed all documentation in the hard copy task order file and in the electronic acquisition system;
- Reviewed the Federal Acquisition Regulation;
- Reviewed U.S. Government Accountability Office policy and internal General Services Administration policy;
- Examined federal statutes regarding appropriated funds and fiscal law; and
- Held discussions with National Capital Region acquisition personnel.

Except as noted below, we conducted the audit between April 2011 and October 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

As this work was performed under the continuing oversight of all Recovery Act task orders managed by the Office of Assisted Acquisition Services, internal controls have not been fully assessed. Only those internal controls discussed in the report have been assessed.

Appendix B – Management Comments

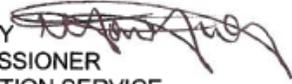
Report Number A110024/Q/A/P12007



GSA National Capital Region

March 22, 2012

MEMORANDUM FOR KENNETH L. CROMPTON
DEPUTY ASSISTANT INSPECTOR GENERAL
FOR ACQUISITION AUDITS
WASHINGTON FIELD OFFICE (JA-A)

FROM: ALFONSO J. FINLEY 
REGIONAL COMMISSIONER
FEDERAL ACQUISITION SERVICE
NATIONAL CAPITAL REGION (WQ)

SUBJECT: Limited Scope Audit of Task Orders NP4700101050 and
NP4700101051 Funded by the American Recovery and
Reinvestment Act of 2009, Reports A110024-3 and A110024-5

We appreciate the opportunity to respond to the Office of Inspector General (OIG) Draft Audit Reports A110024-3 and A110024-5, dated February 23, 2012. We provide the following comments.

I. Audit Report A110024-3: Task Order NP4700101050 - PMO - Finding 1
Audit Report A110024-5: Task Order NP4700101051 - IV&V - Finding 1

On April 27, 2009, the Public Buildings Service (PBS) accepted a Reimbursable Work Authorization from the Department of Homeland Security (DHS) which was funded by DHS Recovery Act budget authority. DHS' Recovery Act funds expired for obligation on September 30, 2010. On September 20, 2010, PBS and the Federal Acquisition Service (FAS) entered into an Interagency Agreement for \$2.9 million for the Project Management Office (PMO) and Independent Verification and Validation (IV&V) services that are the subjects of these audit reports. The solicitations for the PMO and IV&V services were issued by September 20, 2010 and the two task orders were awarded on September 30, 2010. The PMO contractor's responsibility was to support DHS in gathering, documenting, and analyzing requirements received from DHS components. The IV&V contractor's responsibility was to provide quality management, system and acceptance testing, and operations oversight using pre-defined checklists and similar tools founded on industry standards.

U.S. General Services Administration
301 7th Street, SW
Washington, DC 20407-0001
www.gsa.gov

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Appendix B – Management Comments (cont.)

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There is task order documentation indicating that the periods of performance, which began on September 30, 2010, extended into November 2011, at least in regard to the IV&V task order.¹ GSA's Office of Inspector General (OIG) questioned this period of performance on the basis that the services involved were severable services, and thus, the period of performance could not exceed 12 months. After review by the Office of General Counsel (OGC), in June and July 2011, the periods of performance for both task orders were modified to one fiscal year, ending September 29, 2011.

The draft audit reports claim that GSA violated the bona fide needs rule because the periods of performance for the task orders exceeded one year and extended past the period of availability for the Recovery Act Funds. Therefore, the reports conclude that GSA also violated the Anti-Deficiency Act (ADA) by making an obligation that covered a period after the availability of the Recovery Act Funds and in advance of any FY2012 appropriations.

We disagree with this conclusion. The funding authority for the task orders in question was the Acquisition Services Fund (ASF), a no-year revolving fund established by 40 U.S.C. § 321. Therefore, as a factual matter, neither the Bona Fide Needs statute nor the Antideficiency Act was violated.

We agree with the OIG that the Bona Fide Needs statute, 31 U.S.C. § 1502, coupled with 41 U.S.C. § 3902, prevents agencies from obligating time-limited funds for severable services in excess of 12 months from the date the funds expire for obligation. Using a time-limited appropriation in this way could violate the ADA, 31 U.S.C. § 1341, which prohibits officials of the government from obligating funds in excess of or in advance of an appropriation. In this case, however, time-limited funds were not obligated. Although FAS was acting on behalf of DHS, the fund cite used on the task orders was to the ASF, not DHS' Recovery Act funding.

The legal liability of the government was created by the task orders, and thus the obligation was to the ASF. The ASF was not simply a pass-through for DHS to acquire the PMO and IV&V services. GSA, not DHS, was in privity of contract with the vendors, and if there was a dispute or discrepancy in the task orders, GSA was the agency responsible for resolving the issue pursuant to the contract. Most importantly, GSA, not DHS, was liable for paying all bills owed to the contractors using the ASF. The ASF had adequate amounts to liquidate the obligations at all times since the task orders were issued. Also, since the ASF is a no-year account, the Bona Fide Needs statute does not apply and GSA did not incur an obligation in advance of appropriations. Consequently, there was no Antideficiency Act violation.

DHS should ultimately reimburse the ASF for the PMO and IV&V services it receives in fiscal year 2012 from legally available DHS funding sources. This is necessary in order

¹ As discussed below, although there were discrepancies in the task order documentation related to the performance period for the PMO services, there is sufficient documentation establishing that the correct period of performance was intended to be twelve months.

Appendix B – Management Comments (cont.)

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to prevent an augmentation of DHS funds. However, it is not required that DHS provide payment to the ASF in advance of GSA incurring obligations. 40 USC § 321(d) specifically provides:

(3) Timing of payments.--

(A) Payment in advance.--A requisitioning agency shall pay in advance *when the Administrator determines that there is insufficient capital otherwise available in the Fund*. Payment in advance *may* also be made under an agreement between a requisitioning agency and the Administrator. [emphasis added]

(B) Prompt reimbursement.--If payment is not made in advance, the Administration shall be reimbursed promptly out of amounts of the requisitioning agency in accordance with accounting procedures approved by the Comptroller General.

Relying on this authority, it is legal and appropriate for FAS to enter into task orders on behalf of a customer and subsequently seek reimbursement. The decision whether to seek payment in advance or in arrears and/or what fees to charge customer agencies is a business decision within the discretion of GSA. Unless there are insufficient balances in the ASF to cover its obligations, *in toto*, 31 U.S.C. § 1341 is not implicated.

We agree that the services at issue in the two task orders were severable services. Therefore, 41 U.S.C. § 3902 would seem to apply. 41 U.S.C. § 3902(a) provides:

The head of an executive agency may enter into a contract for the procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.

The GAO in *Severable Services Contracts*, B-317636 (Apr. 21, 2009) opined that Section 3902² does not restrict to one year the contract periods of severable services contracts funded by no-year appropriations. Based on this interpretation, 41 U.S.C. § 3902 was not violated. Nonetheless, in order to ensure compliance with relevant law, the two task orders were modified to reduce the periods of performance to 12 months. This corrective action was taken during fiscal year 2011 and within the permissible period for using DHS funding authority. We submit that even if the Bona Fide Needs statute or 41 U.S.C. § 3901 had been violated, this action cured those violations, and an Antideficiency Act violation did not occur.

² The GAO decision was issued in 2009 and refers to 41 U.S.C. § 253l. As part of the recodification of Title 41, Section 253l was renumbered as Section 3902. The recodification did not make any substantive changes to the provision.

The GAO has opined in numerous cases that, even where the Bona Fide Needs Rule or other laws and regulations are violated, if such violations can be corrected, the agency is not responsible for reporting an Antideficiency Act violation. See, *Matter of: Interagency Agreements - Use of an Interagency Agreement between the Counterintelligence Field Activity, Department of Defense, and GovWorks to Obtain Office Space*, B- 309181(August 17, 2007); *Matter of: Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, B- 308944, (July 17, 2007); *Matter of: Financial Crimes Enforcement Network-Obligations under a Cost-Reimbursement, Nonseverable Services Contract*, B- 317139 (June 1, 2009). Typically, violations of the Bona Fide Needs Rule are corrected by adjusting accounts so that the proper account bears the expense. In this case, even if DHS Recovery Act funds had been obligated, because the task orders were modified before any improper expense was incurred, no account adjustment would have been necessary.

II. Audit Report A110024-3: Task Order NP4700101050 - PMO - Finding 2

The draft report states that discrepancies in the task order file documentation related to the period of performance (POP) affected the integrity of the task order.

Although we agree that there were discrepancies in the task order documentation related to the POP, we believe that there is sufficient documentation indicating that the correct period of performance was intended to be twelve months. For example, the Acquisition Plan (AP) in paragraph 7.105(a)(5) addresses Delivery or Performance-Period Requirements. This paragraph states that –

“The period of performance is estimated to be:
Base Period: 20 Sept 2010 – 19 Sept 2011
Option Period 1: 20 Sept 2011 – 19 Sept 2012
Option Period 2: 20 Sept 2012 – 19 Sept 2013”

The AP is prepared at the outset of the procurement and in this case clearly reflects an intended performance period of twelve months.

In addition to the Acquisition Plan, the GSA Form 300, Order for Supplies and Services, for this task order indicates in “Block 20. Schedule”, that the Period of Performance is:

Base Year – 9/30/2010 – 9/29/2011
Option Year 1 – 9/30/2011 – 9/29/2012
Option Year 2 – 9/30/2012 – 9/29/2013

The audit report identifies a response to a potential contractor requesting clarification of the period of performance as indicating that the period of performance is September 29, 2010 to November 28, 2011 as an indication that the intended period of performance was 14 months. However, the information reflected in Block 20 in the award document, the GSA Form 300, shown above supersedes the information provided in response to the solicitation question.

Appendix B – Management Comments (cont.)

Report Number A110024/Q/A/P12007

As the draft Audit Report points out, there are inconsistencies within the award document and between the award document and other order documentation. However, as has been previously explained, the discrepancies between the dates in the order documentation and the date in the task order award are a direct result of the system limitations encountered once documents are uploaded into Information Technology Solutions Shop (ITSS). Once entered into ITSS, the Desired Period of Performance end date field cannot be changed manually. The end date of the POP must be changed via contract modification. In this case, the task order desired POP end date was entered incorrectly, but could not be corrected electronically.

As a result, Modification AS02 sought to correct the period of performance as indicated in Block 18 of the Form 300, Block 14 of the SF30, and in the order documentation.

Although the wording in modification AS02 concerning the nature of the change could have been more precise, this modification was only intended to correct the erroneous desired POP end date reflected in the task order documentation and task order and in no way was intended to affect the POP correctly reflected in the award document in Block 20.

III. Audit Report A110024-3: Task Order NP4700101050 - PMO - Finding 3 Audit Report A110024-5: Task Order NP4700101051 - IV&V - Finding 2

The draft audit reports indicate that accepting funds near the end of the fiscal year resulted in an inadequate amount of time to solicit competition and award the task order.

We disagree that there was an inadequate amount of time to solicit competition and award the task orders.

The notice of the proposed action, was published in FedBizOpps on September 16, 2010 which provided interested GSA Schedule vendors reasonable time to express interest in the requirement and to submit a quote.

The PMO solicitation was issued to six vendors and the IV&V solicitation was issued to four vendors. The solicitation was issued to the vendors in ITSS by September 20, 2010. The solicitation was issued to the number of vendors sufficient to comply with the ordering procedures at FAR 8.405-2. The number of vendors selected was considered adequate to enhance competition, obtain services to meet the agency's needs and took into account the scope, complexity and estimated value of the procurement. The services were not considered to be complex. The scope was limited and the dollar values of the procurements were not considered substantial.

We note that there are no regulatory or statutory time periods for posting Request for Quotes (RFQs). There were no requests for an extension of the closing date which indicates that sufficient time was allowed for submission of quotes.

Appendix B – Management Comments (cont.)

Report Number A110024/Q/A/P12007

Reasonable expectation existed that there was sufficient time to contractually obligate the funds before the end of the fiscal year considering that the requirement was for commercial services that were available on the GSA Schedule.

The use of streamlined procurement techniques was intended to minimize any negative impact on the extent of competition due to the limited timeframe. The GSA Schedule Program is a streamlined procurement process where the commercial firms' capabilities have already been reviewed, the rates have been negotiated, and the vendors have been prequalified. The process significantly reduces the time necessary to obtain goods and services. Another streamlined technique was the use of the on-line Government task and delivery order system, ITSS.

The GSA RFQ posting system e-buy, has a default posting time for solicitations of two days. Although these solicitations were not posted in e-buy, they were open for four days, twice the amount of time as the default setting established in e-buy. Four days was a reasonable time.

The Government further streamlined the procurement process under the PMO solicitation by revising the quote submission process. Amendment 001 deleted the requirement for submission of four copies of vendors' quotes previously required in RFQ Section 17. After one of the vendors commented that: "[n]ot many PMO service companies have the ISO9001 certification required by RFQ Section 18.3", the Government allowed, via Amendment 001, acceptance of the subcontractor's ISO certification. It is likely that Amendment 001 contributed to the number of quotes received.

IV. Audit Report A110024-3: Task Order NP4700101050 - PMO - Finding 4 Audit Report A110024-5: Task Order NP4700101051 - IV&V - Finding 3

The draft audit reports indicate that relying on a poorly developed Independent Government Estimate (IGCE) compromised the price reasonableness determination. We disagree that the IGCE was poorly developed or compromised the price reasonableness determination.

The IGCE meets the minimum requirements identified in Section 4.1.3 of the NCR Acquisition Manual dated July 10, 2010, that was issued by the NCR FAS Acquisition Executive's Office.

"4.1.3 Independent Government Cost Estimate (IGCE). The IGCE, also referred to as "IGE" or "GE", is generally used to (1) determine overall price reasonableness and (2) validate the contractor's understanding of the requirements. At a minimum, it should include:

- Detailed breakdown of labor and materials. These must be validated against information contained in the basic contract used;

Appendix B – Management Comments (cont.)

Report Number A110024/Q/A/P12007

- Breakdown of prices by base/option years (if applicable);
- Application of G&A and Overhead (in accordance with terms and conditions of contractual vehicle used);
- Name and Title of the Preparer; and
- Signature and Date."

In addition, the Price Negotiation memorandum (PNM) dated 9/30/2010 states:

"According to Mr. Arnold Hill from PBS on September 30, 2010, the IGCE was derived from the highest MOBIS schedule labor category rates; therefore the labor hours corresponded to fit the budgeted amount for the IV&V procurement."

The draft PNM indicated that:

"The IGCE was not used for comparison to the contractors quoted labor hours because it does not warrant a higher level of confidence in its accuracy, due to the fact that it was derived by using the hourly rates of the most senior level staff on the MOBIS schedule and then allocating labor hours based on the total budget for the IV&V procurement."

In the absence of an IGCE that could be used completely for comparison purposes, the Government verified the labor rates submitted in the contractor's quote against the Schedule contract labor rates. Under the GSA Schedules Program, GSA has already determined that the labor hour (hourly rate) for a labor/skill category is fair and reasonable. In addition, the ordering activity considered the level of effort and mix of labor/skill categories proposed for the requirement and made a determination that the total price was reasonable for the effort.

V. Audit Report A110024-3: Task Order NP4700101050 - PMO – Finding 5 Audit Report A110024-5: Task Order NP4700101051 - IV&V - Finding 4

According to the draft audit reports, the Not-to-Exceed (NTE) amount for the task order was included in both solicitations. We agree that the task order total NTE amount should not be included in the solicitation. The individuals preparing the solicitations misunderstood the template instructions for RFQ preparation. The individuals involved are not currently working directly for NCR FAS AAS.

VI. Audit Report A110024-5: Task Order NP4700101051 - IV&V - Finding 5

The Draft Report notes that a legal review was not obtained prior to award. Failure to obtain legal review is not a violation of law or regulation. Rather, failure to obtain legal review is merely a failure to comport with FAS internal policy.

We appreciate the opportunity we were provided to review this Draft Audit. If you have any questions or would like to discuss this further, please call me at (202) 708-6100.

Appendix C – Report Distribution

Report Number A110024/Q/A/P12007

Regional Commissioner, Federal Acquisition Service, National Capital Region (WQ)

Regional Administrator, National Capital Region (WA)

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